

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



The Appellant moved to cause his plea of guilty to be vacated, set-aside and held for naught, due to the fact that the trial Court failed to apprise the Appellant of the consequences of his plea in violation of Rule 11. F.R.Cr.P., citing Roberts V. U.S. 491 F2d 1236 (3rd Cir. 1974)

PAGINATION AS IN ORIGINAL COPY



The trial Court denied said motion, and in its order assumes that the Appellant had knowledge of the consequences of his plea, because he was sitting in the Court Room when his brother was so advised as to the consequences of his plea to a like indictment, and also due to the fact that Appellant was an ex-policeman. Both of these arguments must fall on deaf ears because Rule 11, F.R.Cr.P., require that the Defendant be addressed personally and not by proxy.

The U.S. Supreme Court has held in *McCarthy Vs. U.S.* 89 S.Ct. 1166 that failure to comply with rule 11, F.R.Cr.P., are grounds for reversal of the conviction. In the Case of *Giordano*, S.Ct. Reporter Vol 94 1820, U.S. Vs. *Giordano*, the United States Supreme Court held that failure of the Appellee to comply with the law as stated in T. 18 Sec 2516, were grounds to cause all wiretap evidence to be quashed. We See that the position of the U.S. Supreme Court is that all statutory requirements must be complied with according to how they are written.

The trial Court makes another assumption which again must fall on deaf ears, the trial court states "The Court is of the opinion that while the

Petitioner's plea transcript does not indicate that the Petitioner was advised of the mandatory special parole term, the Court did so advise the Petitioner and the Court Reporter may have failed to transcribe that portion of the Rule 11, inquiry"

The Court Reporter is a member of the Court, and the trial Court must take judicial cognizance of its own records, it's a fundamental principle of law.

The only valid argument which appears in the trial Courts order, in the opinion of the Appellant, is the fact that this circuit has not yet ruled upon the issue herein presented, and considered by the Third Circuit in *Roberts Vs. U.S. Supra.* But in view of the U.S. Supreme Court's unwaivering stance to enforce the law as written this Appellant cannot conceive that this circuit would attempt to create an Ad Hoc determination of the law. The laws are made in order that we have an orderly system of doing things within the frame work of the U.S. Constitution, and when the laws are not complied with each person must suffer accordingly for his or her transgression of the law.

In the instant matter the trial Judge failed to comply with rule 11 F.R.Cr.P., as such he must suffer the stigma of having his judgment overruled.

WHEREFORE the reasons forgone stated the Appellant moves the Honorable Court to cause the order of the trial Court denying the Appellant the relief he seeks be and the same reversed thereby vacating the sentence and judgment and allowing the Apellant to plea anew.

For Such An Order The Appellant Shall Ever Pray:

Respectfully Submitted

Dexter Ferguson  
Dexter Ferguson, Appellant Pro. Se.

SWORN TO AND SUBSCRIBED BEFORE ME THIS

22 DAY OF Nov, 1974

Richard L. Phillips

UNITED STATES PAROLE OFFICER

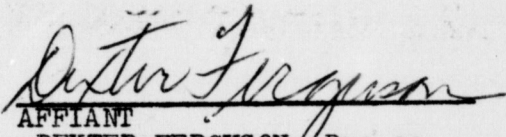
RICHARD L. PHILLIPS, PAROLE OFFICER

U. S. PENITENTIARY

AUTHORIZED BY ACT OF JULY  
7, 1965, TO ADMINISTER  
OATHS (18 U.S.C. 4004).

CERTIFICATE OF SERVICE

It is hereby certified and witnessed that on the 21 day  
of Nov, 1974, the undersigned did hand to the  
Notice of Appeal from judgment U.S. Court  
Federal Parole Officer of Appeal for the second circuit,  
at the Federal Penitentiary, Lewisburg, Pennsylvania, a copy of  
1 original and 4 carbon copies of same Motion for Appeal, for  
mailing, postage preparid, on the same day \_\_\_\_\_ of \_\_\_\_\_, 1974  
( CERTIFIED MAIL RETURN RECEIPT REQUESTED)

  
AFFIANT  
DEXTER FERGUSON, Pro-se  
Box 1000  
Lewisburg, PA. 17837

SWORN TO AND SUBSCRIBED BEFORE ME THIS

\_\_\_\_\_ DAY OF \_\_\_\_\_, 19 \_\_\_\_

\_\_\_\_\_  
UNITED STATES PAROLE OFFICER



000. 0055

**ATTORNEYS**

TITLE OF CASE

For Plaintiff: Dexter Ferguson

Fr 3 Se

L.O. Box 1000

Louisburg, Pa., Sept.

*For Defendant:*

BASIS OF ACTION:

(Reference Case 10-0-100)

JURY TRIAL CLAIMED

ON

1-250

### ABSTRACT OF COSTS

## RECEIPTS, REMARKS, ETC.

[illegible]

ONLY COPY AVAILABLE

100-1507  
 November 21, 1974  
 LEWIS ORGEL  
 CLERK  
 Brian R. Barett

ONLY COPY AVAILABLE



91403

FILED  
CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.

NOV 6 - 1974

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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TIME A.M. ....  
P.M. ....

UNITED STATES OF AMERICA  
ex rel. DEXTER FERGUSON,

M'FILED  
74-C-1055

Petitioner,

DECISION AND ORDER

-against-

UNITED STATES OF AMERICA,

November 6, 1974

Respondent.

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TRAVIA, D. J.

The petitioner was charged in indictment number 73-CR-118 with importing marijuana, conspiring to import marijuana, distributing marijuana and possessing marijuana with intent to distribute. On April 2, 1973, the petitioner pleaded guilty to counts eight and ten of indictment number 73-CR-118. Subsequent thereto, on June 15, 1973, the petitioner was sentenced to a term of five years in prison plus a special parole term of five years on count eight of indictment number 73-CR-118. Similarly, on count ten of indictment number 73-CR-118, the petitioner was sentenced to a term of one year in prison plus a special parole term of two years to run consecutively to the sentence imposed on count eight.

The petitioner now moves to vacate and set aside

his judgment of conviction and sentence pursuant to Title 28 U.S.C. § 2255 on the ground that the court failed to apprise him at the time of his plea that he would be subject to a special parole term upon the expiration of any term of imprisonment imposed by the court.

Rule 11, Fed. R. Crim. P. provides in pertinent part:

"The court may refuse to accept a plea of guilty, and shall not accept such a plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." (Emphasis added).

The term "consequences" has been interpreted by the Court of Appeals for this Circuit to include the maximum possible sentence and the unavailability of parole. See Jones v. United States, 440 F.2d 466 (2d Cir. 1971); Bye v. United States, 435 F.2d 177 (2d Cir. 1970). However, the Second Circuit has not yet passed upon the question of whether the mandatory minimum special parole term is one of the "consequences" envisioned by Rule 11. But see United States v. Richardson, 483 F.2d 516 (8th Cir. 1973); Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974). Nevertheless, even assuming arguendo that the mandatory minimum special parole term is a "consequence" within the meaning of Rule 11, the circumstances attendant to the petitioner's guilty plea require the denial



of the instant motion.

On April 2, 1973, the court also accepted the plea of the petitioner's brother, Arthur Ferguson. During the colloquy between the court and Arthur Ferguson, the court advised him that if he was sentenced to a term of imprisonment, the court would be obligated to impose a minimum special parole term of two years. See Plea Transcript of Arthur Ferguson at 22. Since the petitioner was in the courtroom at the time of his brother's plea, some fifteen minutes prior to the proffering of his own plea, it is highly likely that the petitioner heard the court's statement on special parole. In addition, it is important to note that the petitioner is an ex-policeman who was represented by competent counsel at the time of his plea. As a result, it is difficult to believe that the petitioner was not aware of the mandatory special parole term. Moreover, the court is of the opinion that while the petitioner's plea transcript does not indicate that the petitioner was advised of the mandatory special parole term, the court did so advise the petitioner and the court reporter may have failed to transcribe that portion of the Rule 11 inquiry.

Accordingly, it is

ORDERED that the petitioner's motion to set aside his judgment of conviction and sentence is denied.

4.

The Clerk of the Court is directed to send a copy of  
this Decision and Order to the petitioner.

*Chas. P. Jones*

U. S. D. J.



72CR 304

TRAVIA, J.

TITLE OF CASE

THE UNITED STATES

vs.

ARTHUR FERGUSON,

DEXTER FERGUSON,

WINSTON GREEN,

CLIVE GREEN,

MICHAEL ANTHONY ANDERSON,

JESSE MAE PARRISH, DONALD HEWITT,

WINSTON JOSEPHS, WILSON GARNIER,

and EVANGELINE PORTER

ATTORNEYS

For U.S. WILSON GARNIER  
Arnold E. Greenberg 002-081  
11 Park Place NYC

For DEXTER FERGUSON  
Paul A. Rooney 002-4243  
521 Fifth Ave

For ARTHUR FERGUSON  
Dimitrios C. Fotopoulos  
4170 Broadway 928-8900

For Defendant DONALD HEWITT  
Albert Jacobs 005-5571  
22 W 11th St, NYC

For deft. WINSTON JOSEPHS  
Anthony J. Di Tizio  
112-20-72nd Dr. Forest Hill  
268-1169

For deft PORTER

Gustave Weiss, 1540 Broadway  
JU 6-2327

Did import and possess marihuana

ABSTRACT OF COSTS

AMOUNT

DATE

CASH RECEIVED AND DISBURSED

NAME

RECEIVED

DISBURSED

Fine,

Clerk,

Marshal,

Attorney,

Commissioner's Court,

Witnesses,

DATE

PROCEEDINGS

- 3-17-72 Before Judd J - Indictment filed - Ordered sealed by the Court -  
Bench Warrant Ordered and Issued for defendants.
- 4-72 Before TRAVIA, J. - Motion by AUSA Guy Heineman to unseal indictment - Motion  
Granted - Indictment ordered opened.
- 4-13-72 File 72M490 inserted into criminal file.
- 4-20-72 Before TRAVIA, J., Case Called Defts ARTHUR FERGUSON and counsel Sol  
Rosenblatt, DEXTER FERGUSON and counsel Rooney, WILSON GARNIER and counsel  
Greenberg, and EVANGELINE PORTER and counsel Weiss present. Defts waive  
reading of indictment. Defts arraigned and each enters a plea of not  
guilty. Bail continued as to all defts. 30 days for motions.
- 4-20-72 Notice of appearance filed as to WILSON GARNIER, DEXTER FERGUSON & ARTHUR  
FERGUSON.
- 4-27-72 Before TRAVIA, J., Case Called Deft ANDERSON & counsel Brill, deft.

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DATE	PROCEEDINGS
	PARRISH & counsel Rosenfeld, and deft HEWITT and counsel Jacobs present. Defts waive reading of indictment. Defts arraigned & each enters a plea not guilty. Bail continued as to each deft. - Defts WINSTON GREEN, CLIV GREEN. & WINSTON JOSEPHS are fugitives.
4-27-72	Notice of appearance filed as to DONALD HEWITT:
5-4-72	Government's notice of readiness for trial filed.
5-19-72	Before ROSLING, J. - Case called. Deft NICHOLAS CAMODEO & counsel present. Adjourned to May 26, 1972 at 10 A.M.
6-8-72	Notice of motion for bill of particulars, discovery and inspection, suppression and dismissal filed, ret. 6-16-72 at 10 A.M. re DEXTER FERGUSON.
6-16-72	Before TRAVAI, J. - Case called on deft DEXTER FERGUSON's motion for a bill of particulars, discovery, inspection, suppression & dismissal. Adjourned to July 14, 1972 at 10 A.M.
6-22-72	Bench warrant issued (JOSEPH).
6-22-72	Before RAYFIEL, J. - Case called. Deft JOSEPHS produced in court on the execution of a bench warrant. Court assigned John Leone to represent deft. Plea of not guilty entered on deft's behalf. Bail fixed at \$10,000.00 surety bond.
6-26-72	By TRAVIA J - Order appointing counsel filed (JOSEPHS)
6-30-72	Notice of motion filed ret. 7-14-72 at 10 A.M. re ARTHUR FERGUSON for a bill of particulars, discovery & inspection, suppression & dismissal.
7-6-72	Before TRAVIA J - Case called - Oral application for reduction of bail of deft JOSEPHS - Bail reduced to \$10,000 - 10% Cash - Bail of \$1,000 cash.
7-14-72	Before TRAVIA, J. - Case called. Defts' motion for a bill of particulars, discovery & inspection, suppression & dismissal argued. Motions granted in part & denied in part. Suppression motion adjourned to trial date.
7-14-72	Letter dated 7-10-72 from Paul K. Rooney filed directing the return and suppression of all evidence taken at time of arrest of ARTHUR FERGUSON.
7-14-72	Affidavit in opposition and cross motion filed by govt.
7-14-72	Affidavit in opposition and cross motion filed by Govt.
7-17-72	Memorandum of law filed (DEXTER FERGUSON).
7-17-72	Bench warrant returned and filed/executed. (as to deft. JOSEPHS)
7-24-72	Bench warrants issued for defts GREEN (ordered by Judd 3-17-72).
8-14-72	Before BARTELS, J. - Case called. Deft WINSTON JOSEPHS & counsel Anthony DiPaola present. Bail reduced to \$2,500.00 surety bond, with a 10% cash alternative of \$250.00.
8-15-72	Notice of Appearance filed for deft Porter. (Original assignment in Magistrates folder of Order apptg counsel. <i>file in Winston</i> )

72CR-304  
CRIMINAL DOCKET

DATE	PROCEEDINGS
10-17-72	Letter dated 10-10-72 received from deft WINSTON JOSEPHS considered as a motion for reduction of bail ret 10-20-72 at 2 P.M.
10-20-72	Before TRAVIA J - Case called & adjd to Oct. 27, 1972 (reduction of bail as to deft WINSTON JOSEPHS)
10-27-72	Before Travia J - Case called - Bail previously set is revoked- court sets bail at \$10,000- defts motion to dismiss etc. Motion denied. (WINSTON JOSEPHS) Bench Warrant Ordered (JOSEPHS)
11-1-72	Magistrates' filex 72 M 1966 inserted into CR file.
11-17-72	Bench warrant issued for deft JOSEPHS.
11/22/72	Before NEAHER, J.- Case called- Deft Winston Josephs present without counsel. Deft produced in court on Bench Warrant- Bench warrant vacated- Bail cont.'d.
11/22/72	Bench Warrant returned and filed/Executed-WINSTON JOSEPHS.
11/29/72	Letter dtd 11/24/72 of deft treated as motion to set trial date filed, 12/8/72 (JOSEPHS)
11/29/72	Memorandum dtd 11/28/72 from Hon. ANTHONY J. TRAVIA TO Hon. EDWARD R. NEAHER Filed- re: WINSTON JOSEPHS.
12/8/72	Before TRAVIA, J.- Case called- Adjd to 1/5/73 for all purposes at 10:00 A.M.
12-20-72	Stenographers transcript dated Dec. 8, 1972 filed (JOSEPHS)
1-5-73	Before Travia J - Case called - Deft WINSTON JOSEPHS not present - counsel Anthony Di Paola present - Bail reduced to \$1,000 personal bond - case adjd to Jan. 19, 1973 for trial.
1-15-73	Magistrate's file 73 M 27 inserted into CR file.(JOSEPHS)
1/19/73	Case called- Adjd to 1/26/73 for all purposes at 10:00 A.M.
1/22/73	Before TRAVIA, J.- Case called- Adjd to 2/2/73 for all purposes at 10:00 A.M.
1/27/73	Before TRAVIA, J.- Case called- Adjd to 4/2/73 for trial. (WINSTON JOSEPHS)
5/73	Voucher for compensation filed (for deft WINSTON JOSEPHS)
2/73	Before TRAVIA, J.- Case called- This case is superseded into 73CR118- Bench Warrant was ordered in 73CR118
4-16-73	Before Travia J - Case called - Deft HEWITT & counsel Albert Jacobs present - On motion of Asst US Atty Heinemann the Indictment is dismissed.
4-16-73	By Travia J - Order of dismissal filed (DONALD HEWITT)





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U. S. DISTRICT COURT E.D. N.Y.

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NOV 9 1973

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

TIME A.M.....  
P.M.....

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UNITED STATES OF AMERICA,

:

73-CR-118

-against-

:

Decision and Order

ARTHUR FERGUSON,  
DEXTER FERGUSON,

:

November 9, 1973

:-

Defendants.

:

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TRAVIA, D. J.

By motion dated October 11, 1973, made by the attorney for the defendants named herein, the defendants seek a reduction of sentence imposed by this court on June 15, 1973. The motion of the defendants supported by an affirmation made by the said attorney, Barry Krinsky, was heard on the 26th day of October 1973. At that time the court directed the attorney to submit affidavits rather than permit the production of witnesses on a hearing of the people who would so testify. The said attorney has since submitted to this court the affidavit of Dr. Carlos Huerta, sworn to on October 31, 1973; the affidavit of Pastor Edwin J. Humphrey, sworn to on November 1, 1973; the affidavit of Robert Reed, sworn to on October 31, 1973; the affidavit of Elder T.X. Perry, sworn to on November 1, 1973; the affidavit of Harold Petersen, sworn



to on October 31, 1973; the affidavit of Donald E. Brown, sworn to on November 1, 1973; the affidavit of Peter T. McGalliarra, sworn to on October 31, 1973 and a letter signed by one William Richardson on the letterhead of McDonald's, dated October 19, 1973.

This case is a multi-defendant case involving importation, a Schedule I controlled substance, in violation of Title 21 of the United States Code section 952(a) and 960(a)(1) and Title 18 of the United States Code section 2. There are thirteen defendants including the defendants named herein. This court is thoroughly familiar with all the facts and circumstances surrounding this case since, except for the defendants named in the indictment who are fugitives, they have been before the court for sentencing based upon pleas of guilty and during the course of such proceedings have become familiar with the facts and sentences surrounding this case. The defendants named herein were each represented by an attorney other than the attorney who is now appearing on behalf of both defendants. At the time of sentence the court had before it not only all of the information concerning this case but a number of letters which were sent in by people interested in these defendants, including all the people who are presently submitting affidavits with the exception of Mr. Brown and Mr.





Petersen referred to herein.

The court has nevertheless taken into consideration the arguments of counsel and the representative of the government, has thoroughly reviewed the entire file in this case, its presentence file with all its contents and the affidavits submitted as heretofore referred to, and concludes that there is no valid basis for the court to modify the sentences imposed in any way.

Accordingly it is

ORDERED that the applications of the defendants be and the same are denied.

The Clerk of the Court is directed to send a copy of this Decision and Order to the defendants.

*Anthony P. Travia*

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U. S. D. J.